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IN THE

Supreme Court of the United States

October Term, 1963

No. 502

OLIVER OREN CLARK,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari Directed to the District Court of Appeal, Second Appellate District, State of California.

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To the Honorable Chief Justice, Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Oliver Oren Clark, respectfully petitions for a Writ of Certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, to review and reverse two related judgments of conviction, numbers, respectively, 2nd Crim. 8297, and 8298, in said Court, and sentence, in which the petitioner, an attorney at law, was sentenced to one year's consecutive imprisonment in the County Jail on each of the two judgments.

This Petition is based upon denials of due process of law, and upon the denial of the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Jurisdiction

Jurisdiction is conferred by Title 28, Section 1257-(3). Judgment in this case was rendered by the District Court of Appeal of the State of California on May 6, 1963. A Petition for Rehearing was duly and regularly filed within the time fixed by law and was denied on June 3, 1963. A Petition for Hearing was duly and regularly filed within the time fixed by law in the Supreme Court of the State of California on June 13, 1963 and a hearing was denied by that Court on July 3, 1963. This Petition for a Writ of Certiorari is being filed within ninety days of the denial thereof.

Opinions Below.

The Opinion of the Honorable District Court of Appeal is contained in 30 California Reporter, 487, and is attached hereto as an appendix.

The Opinion of the Honorable Trial Judge, stated from the Bench in explanation, and support, of his conclusion that your Petitioner was guilty of the violation of the California Corporate Securities Act, as charged, is contained in the Reporter's Transcript, page 238, line 20, to line 19, page 240, and is attached hereto as an appendix.

Statutes Involved.

Fourteenth Amendment to the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

§1373. Corporation undistributed taxable income taxed to shareholders.

(a) General rule.—The undistributed taxable income of an electing small business corporation for any taxable year shall be included in the gross income of the shareholders of such corporation in the manner and to the extent set forth in this section.

(b) Amount included in gross income.—Each person who is a shareholder of an electing small business corporation on the last day of a taxable year of such corporation shall include in his gross income, for his taxable year in which or with which the taxable year of the corporation ends, the amount he would have received as a dividend, if on such last day there had been distributed pro rata to its shareholders by such corporation an amount equal to the corporation's undistributed taxable income for the corporation's taxable year. For purposes of this chapter, the amount so included shall be treated as an amount distributed as a dividend on the last day of the taxable year of the corporation.

(c) Undistributed taxable income defined.—For purposes of this section, the term "undistributed taxable income" means taxable income (computed as provided in subsection (d)) minus the amount of money distributed as dividends during the taxable year, to the extent that any such amount is a distribution out of earnings and profits of the taxable year as specified in section 316(a) (2).

(d) Taxable income.—For purposes of this subchapter, the taxable income of an electing small business corporation shall be determined without regard to—

(1) the deduction allowed by section 172 (relating to net operating loss deduction), and

(2) the deductions allowed by part VIII of subchapter B (other than the deduction allowed by section 248, relating to organization expenditures).

Added Pub. L. 85-866, Title I, §64(a), Sept. 2, 1958, 72 Stat. 1652.

Section 26104, Corporations Code of the State of California

§26104. Public offenses; penalty

Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by a fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years or in a county jail not exceeding one year, or by both such fine and imprisonment:

(a) Issuance or sale of security in nonconformity with permit. Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State.

(b) False statements to commissioner. In any application to the commissioner, or in any proceeding before him, or in any examination, audit, or investigation made by him or his authority, knowingly makes any false statement or representation, or, with knowledge of its falsity, files or causes to be filed in the office of the commissioner any false statement or representation concerning the company or the property which it then holds or proposes to acquire, or concerning its officers or its financial condition or other affairs, or concerning its proposed plan of business, or, with knowledge of the falsity of any such statement or representation, issues, executes, or sells, or causes to be issued, executed, or sold, any security.

(c) Application of security proceeds in violation of permit. Directly or indirectly, knowingly applies, or causes or assists in causing to be applied, the proceeds, or any part thereof, from the sale of any security to any purpose contrary to the provisions of the permit authorizing the issue of the security, or to any purpose specified in the permit in excess of any amount limited in the permit to be used for that purpose.

(d) Sale of security issued in violation of law. With knowledge that any security has been issued or executed in violation of any provision of this division, sells, or offers the security for sale.

(e) False, misleading, or deceptive advertisement. Issues, circulates, or publishes, or causes to be issued, circulated, or published, any advertisement, pamphlet, prospectus, or circular concerning any security containing any statement that is false

or misleading, or otherwise likely to deceive a reader thereof, with knowledge that it contains such false, misleading, or deceptive statement.

(f) Violation of law or commissioner's order or permit. In any respect willfully violates or fails to comply with any provision of this division, or wilfully violates or fails, omits, or neglects to obey, observe, or comply with any order, permit, decision, demand, or requirement, or any part or provision thereof, of the commissioner under this division.

(g) Conspiracy. With one or more other persons, conspires to violate any permit or order issued by the commissioner or any provision of this division. (As amended Stats. 1957, c. 139, p. 736, §7.)

Section 25100(m), Corporations Co of the State of California

"Except as otherwise expressly provided in this division, the Corporate Securities Law does not apply to any of the following classes of securities: . . . (m) Any bona fide joint adventure interest, except such interests when offered to the public."

Section 1203, Penal Code of the State of California

§1203. Probation; hearing or summary denial; pre-sentence investigation; report, and recommendations; mitigating circumstances; power to grant probation; transmittal of report on denial of probation; offenses for which probation can not be granted; procedure for entry into another state; investigation and report where defendant ineligible.

After the conviction by plea or verdict of guilty

of a public offense not amounting to a felony, in cases where discretion is conferred on the court or any board or commission or other authority as to the extent of the punishment, the court, upon application of the defendant or of the people or upon its own motion, may summarily deny probation, or at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted. If probation is not denied, and in every felony case in which the defendant is eligible for probation, before any judgment is pronounced, and whether or not an application for probation has been made, the court must immediately refer the matter to the probation officer, to investigate and to report to the court, at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment. The probation officer must thereupon make an investigation of the circumstances surrounding the crime and of the prior record and history of the defendant, must make a written report to the court of the facts found upon such investigation, and must accompany said report with his written recommendations, including his recommendations as to the granting or withholding of probation to the defendant and as to the conditions of probation if it shall be granted. The report and recommendations must be made available to the court and the prosecuting and defense attorneys at least two days prior to the time fixed by the court for the hearing and determination of such report and

must be filed with the clerk of the court as a record in the case at the time of said hearing. By written stipulation of the prosecuting attorney and the defense attorney, filed with the court, or by oral stipulation in open court made and entered upon the minutes of the court, the time within which the report and recommendations must be made available and filed, under the preceding provisions of this section, may be waived. At the time or times fixed by the court, the court must hear and determine such application, if one has been made, or in any case the suitability of probation in the particular case, and in connection therewith must consider any report of the probation officer, and must make a statement that it has considered such report which must be filed with the clerk of the court as a record in the case. If the court shall determine that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, the court shall have power, in its discretion to place the defendant on probation as hereinafter provided; if probation is denied, the clerk of the court must forthwith send a copy of the report and recommendations to the Department of Corrections at the prison or other institution to which the defendant is delivered.

In every misdemeanor case, the court may, at its option refer the matter to the probation officer for investigation and report or summarily deny probation or summarily grant probation.

The Legislature hereby expresses the policy of the people of the State of California to be that,

except in unusual cases where the interest of justice demands a departure from the declared policy, no judge shall grant probation to any person who shall have been convicted of robbery, burglary or arson, and who at the time of the perpetration of said crime or any of them or at the time of his arrest was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted, nor to one who in the perpetration of the crime of which he was convicted wilfully inflicted great bodily injury or torture, nor to any such person unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor previously convicted in any other place of a public offense which would have been a felony if committed in this State.

Probation shall not be granted to any person who shall have been convicted of burglary with explosives, rape with force or violence, murder, assault with intent to commit murder, attempt to commit murder, train wrecking, kidnaping, escape from a state prison, conspiracy to commit any one or more of the aforementioned felonies, and who at the time of the perpetration of said crime or any of them or at the time of his arrest was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon upon a human being in connection with the per-

petration of the crime of which he was convicted nor to one who in the perpetration of the crime of which he was convicted wilfully inflicted great bodily injury or torture, nor to any defendant unless the court shall be satisfied that he has not been twice previously convicted of felony in this State nor twice previously convicted in any other place or places of public offenses which would have been felonies if committed in this State; nor to any defendent convicted of the crime of burglary with explosives, rape with force or violence, murder, attempt to commit murder, assault with intent to commit murder, train wrecking, extortion, kidnaping, escape from a state prison, violation of Sections 286, 288 or 288a of this code, or conspiracy to commit any one or more of the aforesaid felonies, unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor previously convicted in any other place of a public offense which would have been a felony if committed in this State; nor to any defendant unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor convicted in any other place of a public offense which would have been a felony if committed in this State and at the time of the perpetration of said previous offense or at the time of his arrest for said previous offense he was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same) or he personally used or attempted to use a deadly weapon upon a human being in connection with the perpetration of said previous offense

or in the perpetration of said previous offense he wilfully inflicted great bodily injury or torture; nor to any public official or peace officer of the State, county, city, city and county, or other political subdivision who, in the discharge of the duties of his public office or employment, accepted or gave or offered to accept or give any bribe or embezzled public money or was guilty of extortion.

No probationer shall be released to enter another state of the United States, unless and until his case has been referred to the California Administrator, Interstate Probation and Parole Compacts, pursuant to the Uniform Act for Out-of-state Probationer and Parolee Supervision.

In those cases in which the defendant is not eligible for probation, the judge may in his discretion refer the matter to the probation officer for an investigation of the facts relevant to sentence. The probation officer must thereupon make an investigation of circumstances surrounding the crime and the prior record and history of the defendant and make a written report to the court of the facts found upon such investigation. (As amended Stats. 1957, c. 385, p. 1218, § 1; Stats. 1957, c. 2054, p. 3648, § 1.)

The Questions Presented.

This petition presents nine important questions of law as to each of which your petitioner contends that he has been denied due process and the equal protection of the law, as guaranteed to him under the Fourteenth Amendment to the Constitution of the United States. These are:

In in re No. 8298.

I.

Whether a Corporation Which Has Ten, or Less, Members, and Which Complies With the Procedures of the Federal Tax Exemption's Statute (Title 26, U. S. C. A. Section 1371) May Be Denied the Tax Benefits of That Statute Because It Clothes a Joint Venture, Notwithstanding an Identical Membership in Each.

II.

Whether the Burden of Proof May Be Shifted to a Defendant in a Criminal Case Whenever He Defends Under the Statutory Exception of a Joint Venture to the Operation of the Corporate Securities Act of the State of California, as Stated in Section 25100 M of That Statute, When the Evidences Which Determine the Character, and Status, of the Enterprise in Issue, Are Clear, and Equally, and Immediately, Available to the Prosecution; and to the Defendant?

III.

Whether a Defendant May Be Convicted Upon Circumstantial Evidences That Are Consistent With the Hypothesis of His Innocence?

IV.

Whether a Bona Fide Joint Venture May Be Denied Exemption From the California Corporate Securities Act Under Section 25100 M of That Act, Because It Is Clothed in Corporate Form?

V.

Whether the Conviction of a Defendant in a Criminal Case May Be Sustained Upon an Assumption by an Appellate Court, of Indispensable Facts That, Indisputably, Are Not Supported, but Are Refuted by the Record.

VI.

Whether a Citizen of the State of Nevada May Be Denied the Benefits of the Laws of the State of California, When in Like Circumstances They Are Accorded to a Citizen of California?

In re No. 8297.

VII.

Whether an Appellant in a Criminal Case May Be Denied an Augmentation of the Record to Include Matters, Immediately, and Conveniently, Available as to Which the Trial Court Said He "Had Not *Paid Any Attention*," and Which, Because of Said Statement, Were Excluded From the Record That Was Approved by Appellant, and by Respondent, and by the Trial Court, When the Request for Said Augmentation Was Timely Made:

VIII.

Whether an Appellate Court May Affirm the Conviction of an Appellant in a Criminal Case, *Upon a Presumption* That the Matters Contained in Documents Excluded From the Record Because the Trial Court Stated That It "Had Not Paid Any Attention to Them," Supported the Judgment Appealed From Notwithstanding Appellant's Timely, and Adequate, Requests for an Augmentation of the Record to Include Said Materials.

IX.

Whether Probation May Be Revoked in a Criminal Case Upon the Grounds:

(1) that restitution had not been made, although (a) the time had not expired within which payment was required; (b) it was shown that the defendant had not been able to make restitution, and (c) it was shown that the defendant, and his associates, believed that he could make restitution within the eighteen remaining days of said period.

(2) that the defendant had been convicted in said case No. 8298, by the judge, sitting without a jury, who revoked the probation, upon the violation of the Corporate Securities Act of California, in circumstances that factually, and legally, commanded his acquittal.

Each of these contentions was submitted to the Honorable District Court of Appeal, and rejected, as hereinafter shown.

Reasons for Granting the Writ.

This case raises the *nine* questions of law last hereinbefore stated under the topical heading *"The Questions Presented."*

Each of these is of critical importance to the proper and uniform administration of justice under the Constitutions and laws of the United States of America and of the State of California, and to your petitioners.

Unless these judgments are reversed, the law as therein declared, and applied, will stand in marked and irreconcilable contrast to the law as stated in our con-

stitutions, and statutes, and as heretofore stated, and applied, by the appellate courts of our state, and nation, and in this condition of unnecessary, and unjustifiable, confusion, your petitioner, and others, will be subjected to harsh penalties, not deserved, and that are in violation of sacred constitutional heritages.

The Facts Are.

Your Petitioner is an attorney at law. He is 78 years of age. For many years he engaged principally in corporate practice.

This Petition is in respect of *two related cases* which, upon his appeals from the Superior Court at Los Angeles, California, unto the District Court of Appeal, Second Appellate District, of the State of California, under Numbers 8297, and 8298, respectively, in said Court, were consolidated for hearing, and determination; because of their relationship, and were affirmed in a *single opinion* by that Honorable Court on May 6, 1963. (Appendix.)

Your Petitioner, within the time allowed by law, petitioned for a rehearing in said Court, and this was denied on June 3, 1963.

Your Petitioner, within the time allowed by law, petitioned the Supreme Court of California for a hearing of said cases in said Court, and said petition was denied on July 3, 1963.

IN RE 2ND CRIM. NO. 8298.

In December 1959, your petitioner and Emil Ruberti united in the initiation, and operation as a *joint venture* of a chain of discount merchandising stores in Nevada, and California. Within a few weeks they were joined by Sam Rothman, and Bernie Mason.

From the beginning [R. T. p. 117, line 21, to p. 179, line 3; p. 184, lines 5-11, 18-25], and thereafter as each additional associate was accepted, *it was agreed* by everyone: (a) that the ultimate membership should be limited to ten so as to qualify the enterprise for federal tax exemption under the then recently enacted "Small Business Men's" statute—Title 26, U.S.C.A. Section 1371, and (b) that each associate should have an *active voice* in the control, and operation, of the enterprise.

Within a few weeks after the initiation of said enterprise, upon the advice of tax counsel [R. T. p. 178, lines 14-17] this *joint venture* was incorporated under the name Quality Discounts, Inc., under the law of the State of Nevada, to qualify for said federal tax exemption. It is settled law that the incorporation of this joint venture *did not change its status* as a joint venture. (*Enos v. Picacho*, 56 Cal. App. 2d 765, 762.)

On April 1, 1960, at a meeting of the associates—Ruberti, Rothman, Mason and Clark, and of three candidates for association—Montana, Jacobs, and Esterson, at Las Vegas, Nevada, Mason resigned, and said candidates were accepted as associates *upon the express understanding, and agreement*, that each associate should have an *equal* and *active* voice in the conduct and control of the enterprise, and that its members would be limited to ten, to qualify for said federal tax exemption. Subsequently, *Wall* and *Mirabella* were accepted upon the same understanding, and agreements. [*Jacobs*, R. T. p. 92, line 25, to p. 93, line 16; p. 100, line 25, to p. 101, line 7; p. 103, line 20, to p. 104, line 5; *Montana*, p. 35, line 26, to p. 36, line 11; p. 37, lines 14-18; p. 43, lines 5-15; p. 44; p. 64, lines 23-26; p. 67, lines

23-26 incl.; *Wall*, p. 144, line 22, to p. 146, line 6; p. 157, lines 21-26 incl.]

This business, from its inception by Ruberti and your petitioner, until about two months after your petitioner's retirement under his doctor's orders, because he had suffered severe attacks of coronary thrombosis, and phlebitis, prospered remarkably well. [R. T. p. 221, lines 1-26 incl.]

It had obtained before your petitioner's retirement, three long term leases upon stores it was then operating in Glendale, Inglewood, and North Hollywood, and two long term leases upon other desirable sites in Southern California, upon which the lessors, at their own expense, had contracted to build stores for the use of this joint venture, and a long term lease upon two very desirable sites in Las Vegas, Nevada. [R. T. p. 192, lines 6-22.]

About two months after your petitioner's retirement, this business was discontinued because the associates could not agree on policies. [R. T. p. 225, line 18, to p. 227, line 10.]

This joint venture never "*publicly offered*" for sale an associate interest therein, or any share of its capital stock.

Jacobs, *Montana*, *Wall*, and *Mirabella* were attracted to this enterprise by a newspaper advertisement [Ex. No. 3-E, Op. Br. p. 29, line 23; App. Opin. p. 4, lines 4-7] by Tom Sliger under the name "Mr. Harry" for "an active associate" in expanding a chain store discount business. At that time he had such a business. [R. T. p. 176, line 20, to p. 177, line 7; p. 213, line 19, to p. 214, line 8.]

As an expectant concessionaire in the stores of this joint venture he used, temporarily, its Glendale store as his office.

Clark testified that he knew nothing about this, or any advertisement, until after he was arrested in said case No. 8297; or that anyone had contacted this joint venture by reason of said, or any, advertisement. [R. T. p. 201, lines 14-26; p. 196, line 17, to p. 202, line 7.]

He testified further that he had disapproved of any advertisement for associates, and that the associates had agreed that there would be no advertisement. [R. T. p. 201, lines 14-20; p. 196, line 17, to p. 202, line 7.]

There is no evidence, either direct, or circumstantial, that contradicts this.

Subsequent to the discontinuance of said business your petitioner was charged by an information upon four counts of technical violations of section 26,104(a) of the California Corporate Securities Act, which involved said transactions with said associates Montana, Jacobs, Wall, and Mirabella. [C. T. in No. 8298.]

There was no charge of coercion, fraud, or personal enrichment in any of these counts.

Your petitioner defended upon the grounds that this enterprise was a joint venture that had *never "publicly offered"* for sale any associate interest therein, or any share of its capital stock; that it was exempt constitutionally, and by section 25100(m) of the California Corporate Securities Act, and by the law of comity between states, from the operation of said act.

On October 13, 1961, your petitioner was convicted on each of said four counts by Honorable Philip H. Richards, sitting without a jury, in the Superior Court

at Los Angeles, California, and sentenced to pay a fine of $3,000, and to serve one year in the Los Angeles County Jail.

Your petitioner appealed to the District Court of Appeal, Second Appellate District, State of California, from said judgment, and on May 6, 1963, said judgment was affirmed by said appellate court.

Within the time allowed by law your petitioner applied for a rehearing in said appellate court, and said petition was denied on June 3, 1963.

Within the time allowed by law, your petitioner applied to the Supreme Court of the State of California, for a hearing in said court, and said petition was denied on July 3, 1963.

2ND CRIM. NO. 8297.

In this case your petitioner had formed a corporation under the laws of the State of Nevada, to engage in the business of: (1) mining certain rare, and valuable quartz, onyx, and marble materials from deposits it controlled in the State of Arizona; Nevada, and California, and (2) processing the same at a plant it erected on the railroad at Cucamonga, in San Bernardino County, California, for marketing, with the use of special, expensive, equipment it had imported from Italy, and (3) in marketing said products from said plant.

Because funds were raised from willing, and experienced, investors in California, your petitioneer was convicted, upon his plea of guilty before Honorable LeRoy Dawson, on two counts of a technical violation of section 26.102a of the California Corporate Securities Act.

These counts did not involve any coercion, fraud, or personal enrichment.

Your petitioner pleaded guilty to *two* counts of a violation of the California Corporate Securities Act.

On February 19, 1957, before said Honorable Le Roy Dawson, judgment was suspended (there was no fine, or imprisonment imposed), and your petitioner was placed on probation for a period of five years, upon the conditions: (1) that he should not violate the law, and (2) that he make restitution unto those of the more than fifty investors of more than $200,000 in said enterprise, who should desire a return of their money.

Upon a survey conducted by your petitioner's probation officers, *only three* of said investors, who represented an aggregate investment of $5,500 desired a return of their money.

Because of conditions satisfactory to the court, your petitioner was allowed the full time of his probationary period, within which to make said restitution.

This time for restitution was never modified. It was *summarily terminated* on February 1, 1962, eighteen days before the expiration of said probationary period, by Honorable Philip H. Richards, notwithstanding, the representations to him that your petitioner, and his associates, and his attorney, believed that your petitioner would be able to make and would make, said restitution within said period.

Said probation was revoked upon the grounds: (a) that your petitioner had not made said restitution, and (b) your petitioner had been convicted by said Honorable Philip H. Richards, sitting without a jury, on four counts of the alleged violations of said section 26104a of the California Corporate Securities Act, in said proceeding No. 8298.

Thereupon, the judgment from which said appeal was taken, was rendered, and your petitioner was sentenced to pay a fine of $3,000, and to serve one year in the Los Angeles County Jail to run consecutively to the like period of your petitioner's imprisonment in said case Number 8298, as hereinbefore reviewed. [R. T. p. 264, lines 13-22.]

Your petitioner contends that the order revoking your petitioner's probation was in excess, and in violation, of the restricted discretion vested in said Court, and that said order, and the judgment entered thereupon, violated the due process, and the equal protection of the law, guaranteed to him by the Fourteenth Amendment to the Constitution of the United States and by Article I, section 12, of the Consitution of the State of California.

This contention is based upon the facts:

(1) that the time within which said restitution was required, had *not expired*, and it was *not shown* that your petitioner could have made restitution therefor;

(2) that your petitioner's conviction by Honorable Philip H. Richards in said proceeding Number 8298, is not supported by any evidence, or any law, and is contrary thereto, and

(3) that the combination of these two circumstances does not constitute the *sound factual basis* upon which only, may probation be revoked in an exercise of the restricted discretion vested in the Court as stated in *In re Cook*, 67 Cal. App. 2d 20, 26, and in *In re Pearon*, 96 Cal. App. 2d 141, 143.

These contentions were presented to the Honorable District Court of Appeal. (Op. Br. pp. 57-69 incl.; Reply Br. p. 42, line 21, to p. 45, line 5; p. 3, lines 1-26; p. 36; Pet. Rehrg. p. 5, line 1, to p. 25; Pet. Hr. p. 5, to p. 38, line 26.)

During the proceedings for the revocation of said probation, said judge stated that *"I haven't paid any attention to the probation reports."* [R. T. p. 255, lines 7-8.]

This statement was never modified, and, for that reason, the probation reports were not included in the record on appeal which record was approved by your petitioner's counsel, and by counsel for the People, and by that judge, as a true record of said proceedings.

Upon appeal, the People suggested that in the absence from the record of said probation reports as to which the Trial Court had said he had not paid any attention, the Appellate Court should *invoke a presumption* that they contained matters which sustained the revocation.

Your petitioner responded to this suggestion (Reply Br. p. 41, line 23) by asking the appellate court for an *augmentation* of the record to include these reports, under Rule 12 of that Court which reads as follows:

Rule 12. Augmentation and correction of record

(a) [Augmentation] On suggestion of any party or on its own motion, the reviewing court, on such terms as it deems proper, may order that the original or a copy of a paper, record or exhibit offered at or used on the trial or hearing below and on file in or lodged with the superior court be transmitted to it, or that portions of the oral proceedings be transcribed, certified and transmitted to it, or that an agreed or settled statement of

portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed a part of the record on appeal [*As amended, effective Jan. 1, 1951.*]

This request was not acted upon, and the appellate court *invoked that presumption* in support of its affirmance of the judgment appealed from, without even mentioning petitioner's request for an augmentation of the record. (Op. Br. p. 25, line 26.)

Your petitioner renewed his request for said augmentation, in his Petition for a Rehearing. (p. 2, line 28.)

Said Court then denied, said request for an augmentation of the record on the ground that *it was belated* and then denied said petition for a rehearing, and thus permitted said presumption to remain in the place of the truth that said records would reveal.

Your petitioner respectfully contends that this conduct of the appellate court denied to him the due process and equal protection of the law, guaranteed to him under the Fourteenth Amendment of the Constitution of the United States.

This contention was presented to the honorable appellate court. (Pet. Rehrg. pp. 2-3.)

Your Petitioner will now present his contentions as to each of the nine questions stated under "*The Questions Presented*".

I.

Whether a Corporate Joint Venture Is Eligible for Tax Exemption Under Title 26 U. S. C. A., Section 1371.

The evidences show, *without any contradiction*, by the testimony of the associates, that this joint venture was incorporated, and limited by its members to ten, *solely* to acquire eligibility for federal tax exemption, under U. S. C. A., Title 26, Section 1371.

The learned appellate court has held, in this case (Op. Br. p. 15, lines 1-2), that "*the benefit of this statute could be had by a corporation only—not a joint venture.*"

This holding, undoubtedly, was of vital, and persuasive, influence in the court's affirmance of your petitioner's conviction.

The trial court, and the appellate court, have stated that petitioner's conduct was a "*thinly veiled*" attempt to avoid the California Corporate Securities Act [Rep. Tr. p. 263, line 3; Op. Br. p. 23, line 5], and "*an afterthought.*" (Op. Br. p. 23, line 2.)

If, in fact, *a joint venture*, although operating in permissible corporate form, *is not eligible* for that tax exemption, then it may be conjectured as the trial, and appellate, courts did, that your petitioner, who is presumed to know the law, drew the fact of this incorporation *as a thin veil* over his conduct as an *after-thought* to avoid the consequences of this prosecution.

Upon the other hand, if a joint venture with ten, or less, members, is eligible for this tax exemption, then this "*thin veil*," and the concept of an "*after-thought*" disappear.

There is no law; and no logic, known to your petitioner which refutes this conception of eligibility. The statute does not state any such restriction, and it may not be implied.

Nothing has been offered to sustain the appellate court's conclusion, and in the presence: (1) of the presumption that the Congress meant what it said; (2) that there is no reason why a joint venture clothed, permissibly, in corporate form, should, or constitutionally could, be excluded, and (3) the presumption of petitioner's innocence, this conjecture of petitioner's criminality must be repudiated.

Your petitioner respectfully submits that this vital error in the appellate court's conclusions upon which petitioner's conviction is affirmed, is a denial of due process, and equal protection of the law, to this petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States. This contention was made to the Honorable District Court of Appeal (Pet. Rehrg. p. 22, line 8) and was disregarded, denied, without mention by that Honorable Court.

II.

Whether the Burden of Proof Shifts Always When Defense Relies on Statutes Exemption.

The People contended that when a defendant, in a criminal case, invokes an exception to a statute, the burden of proof shifts to the defendant to prove the facts which bring him within the exception.

The trial judge accepted this thesis, and convicted your petitioner because, as the judge said, "*I am not convinced that there was a joint venture with bona fides or otherwise.*" [R. T. p. 238, line 24.] *He did not say*

that he was convinced *beyond a reasonable doubt* that this enterprise was not a bona fide joint venture.

Your petitioner denied this legal concept (Reply Br. pp. 3-7 incl.), but the Honorable Appellate Court affirmed the judgment without any reference to it.

Your petitioner contended in the Appellate Court, and contends here, that this conduct denies due process, and equal treatment of the law, to him, in violation of the Fourteenth Amendment to the Constitution of the United States. (Reply Br. p. 7, lines 27-31 incl.)

The burden of proof shifts only as, and when, the defendant invokes an exception to the statute upon which the prosecution rests, *and*:

(a) the evidence held to be inculpatory has, at least, a "sinister significance,"

(b) the proof of its inculpatory nature "is most difficult, if not impossible," for the prosecution to obtain;

(c) the proof that it is not inculpatory, is very easy for the defendant to obtain, and

(d) the State shall "have proved enough to make it just for the defendant to be required to repel what has been proved, with excuse, or explanation."

This law is well settled. It has been stated, and applied, by the Supreme Court of the United States, in *Morrison v. California*, 291 U. S. 82, 78 L. Ed. 664, 669.

In that case, Justice Cardozo, speaking for the Court, said that this burden of proof may be shifted to the defendant, when:

"the State shall have proved enough to make it just for the defendant to be required to repel what has been proved, with excuse, or explanation, or, at least, that upon a balancing of convenience, or the opportunities for knowledge, the shift of the burden will be found to be an aid to the accuser, without subjecting the accused to hardship, or oppression," and that:

"It is essential that there shall be some rational connection between the fact proved, and the ultimate fact presumed, and the inference of one fact shall not be so unreasonable as to be a purely arbitrary mandate," and that:

"For a transfer of the burden, experience must teach that the evidence held to be inculpatory has, at least, a sinister significance."

In this case (*Morrison v. California, supra*) the Court was affirming, and applying, the law as it had been stated in *McFarland v. Amer. Sugar Ref. Co.* (240 U. S. 79, 60 L. Ed. 897, 904), by Justice Holmes, speaking for the Court, wherein it was said that:

"As to the presumptions, of course the Legislature may go a good way in raising one, or in changing the burden of proof, *but there are limits.*

"It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another *shall not be so unreasonable as to be a purely arbitrary mandate.*" (Emphasis added.)

In the case at bar, not one of these stated essentials to any shift of the burden of proof to appellant, is present.

There is not here:

(1) any "sinister significance" in the corporate shares that are the subject matter of the proof;

(2) any circumstance which makes it "most difficult," if not impossible, for the accuser to prove the culpability, if such there were, of these shares of stock;

(3) any proof by the accuser, "enough to make it just for appellant to be required to repel" the ultimate fact presumed by the accuser, or

(4) any rational connection between the fact proved, and the ultimate fact presumed, from which an inference may be drawn that "would not be so unreasonable as to be a purely arbitrary mandate."

These corporate shares are "certificates of interest" which:

"fall within the Corporate Securities Act only when it appears directly, or inferentially, that the buyer contemplates receipt of profits from the activities of other persons." [*People v. Snyde*, 37 Cal. 2d 765, 768.] "Where he is to share in the conduct of the business, the instrument is not a security." [*People v. Davenport*, 13 Cal. 2d 681, 687; *People v. Woolson*, 181 Cal. App. 2d 657, 671, 672.]

These certificates are approved, universally, as evidence of an interest in a joint venture. When involved in a criminal proceeding, the law presumes that they are what they may be, until the presumption is overcome by the evidences. In the absence of such evidence, there cannot be any inference of a "sinister significance." Experience does not teach anything to the contrary.

There is not here, any "most difficult," or a "practically impossible" task, imposed upon the prosecution to prove whether his enterprise is, or is not, a joint venture.

All of the sources of reliable, and adequate, evidences, were always immediately, and conveniently, available for a determination of that fact.

All of the members of this syndicate were available, in the immediate community, for interrogation by the accuser before this proceeding was begun.

Conceivably, each of them would have said, and, we believe, did say, to the accuser, as each of those who testified at the trial, did say, that his investment was of money, and an active participation, and voice, in the management of this enterprise—*a joint venture*.

III.

Whether a Conviction Upon Circumstantial Evidences Consistent With a Hypothesis of Innocence, Can Be Sustained.

In the case at bar, the learned District Court of Appeal stated, and applied, as the rules for factual determination in a criminal case, that:

(1) "a finding that the transaction in question was without the proscription of the statute will not be disturbed if there was substantial evidence to support it." (Op. Br. p. 2, line 21);

(2) "before a judgment of conviction may be reversed on the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." (Op. Br. p. 3, lines 10-16); and

(3) "we must assume, in support of the judgment, the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts justify the inference of guilt." (Op. Br. p. 3, lines 16-20.)

These are not the rules that apply where, as here, the evidences, *if there are any,* which tend to support the hypothesis of guilt, *are circumstantial.*

In such a case, and this is one, the rule of determination is, as stated by the Supreme Court of California in the late cases of *People v. Yrigoyen,* 45 Cal. 2d 709, 724, 256 P. 2d 317, and *People v. Kedrick,* 55 Cal. 2d 282, 290, that:

> "to justify a conviction on *circumstantial* evidence the facts and circumstances must not only be entirely consistent with the theory of guilt *but must be inconsistent* with any other rational conclusion."

In the case at bar, *each* of the witnesses testified, directly that it was the *express* agreement of the associates, that each associate should have an *equal, active voice* in the *control, management and operation* of the business of the association.

These were: Clark [R. T. p. 178, line 14, *et seq.*]; Montana [R. T. p. 36, lines 3-4, 7-11; p. 37, lines 14-17, incl.; p. 38, lines 8-11, incl.; p. 43, lines 5-15, incl.; p. 64, lines 23-26, incl.]; Jacobs [R. T. p. 92 line 25, to p. 93, line 15]; Wall [R. T. p. 144, lines 22-24, incl.; p. 157, lines 21-26, incl.; p. 158, lines 20-24, incl.]; and Mirabella [R. T. p. 117, line 24, to p. 118, line 3]. *There is no evidence to the contrary.*

This analysis, and said supporting authorities, were presented by petitioner to the Honorable District Court of Appeal (Resp. Br. pp. 3-9, incl.) and they were bypassed by it without recognition, or comment.

Petitioner respectfully submits that in the matter here reviewed, he has been denied the due process, and the equal protection of the law, guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and that his acquittal is mandatory.

IV.

Whether a Joint Venture Operating in Corporate Form Is Exempt From the Operation of the California Corporate Securities Act.

The learned District Court of Appeal, in this case (Op. Br. p. 18, line 24) affirmed a doctrine announced by it in *People v. Mills*, 162 Cal. App. 2d 840, that *a corporation cannot be set up which will exempt sale of the stock from control of the statute.*

Upon this thesis the conviction of your petitioner for a violation of that Act, was affirmed.

Your petitioner respectfully submits that said thesis *is not the law*, and that its invocation here denies to your petitioner the *due process* and the *equal protection of the law*, guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

That this doctrine is *not the law* is clearly, and uniformly, stated in our constitutions and statutes, and by our courts until the decision in the case at bar, by the District Court of Appeal.

To enforce it would be to *rewrite*, by judicial decree, our constitutions, and our statutes, in violation of the powers reserved to the people, and in an exercise of

authority never granted to our courts. (*Ex parte McNulty*, 77 Cal. 164, 168.)

Your petitioner's thesis is verified by the facts, and the rules, that:

(1) a *joint venture* is expressly exempted from the California Corporate Securities Act (Section 25100, subd. (m));

(2) a joint venture may be *clothed in corporate form* (*Enos v. Picacho*, 50 Cal. App. 2d 765, 762);

(3) "*any certificate of interest*" in a joint venture is not a security (*People v. Davenport*, 13 Cal. 2d 681, 687), and

(4) a "*certificate of stock*" in a joint venture operating, permissibly, in corporate form, is a "*certificate of interest*" in a joint venture.

This analysis, and these supporting authorities, were presented by your petitioner to the Honorable Appellate Court herein, and were *by-passed* by it without recognition, or comment. (Pet. Rehrg. p. 18, line 1 to end.)

V.

Whether a Conviction May Be Sustained Upon an Assumption of Indispensable Facts Not Supported by the Record.

In its Opinion, wherein your petitioner's conviction was affirmed, said Honorable District Court of Appeal misconceived, and stated as a basis for its action, *thirteen* very important misconceptions of the factual record. Each of these, if true, would have created a conflict in the evidence upon which the stature of this enterprise as a joint venture would be determined. Indisputably, these misconceptions are not supported by the evidence.

These factual misconceptions were presented to the Honorable Appellate Court (Pet. for Rehrg. pp. 5-15, incl.) and by-passed without mention, or correction.

As a service to brevity, your petitioner will present *only* eight of these misconceptions here.

Your petitioner respectfully submits that these misconceptions of the evidences are of such vital importance here that separately, and collectively, they deny due process to your petitioner. It is long, and well settled, law that:

> "Due process requires a fair trial before an impartial tribunal, and that requires that the person, or body, who decides the case *must know the evidence.* It is the substance rather than mere form that is determinative of whether due process has been afforded." (*Horeiter v. Garrison*, 81 Cal. App. 2d 384.)

It is demonstrated here, beyond any doubt, that the Honorable trial judge, and the members of the Honorable Appellate Court, did "*not know the evidence*," which controlled their opinions.

These eight factual misconceptions are:

(1) THE COURT ASSUMED that Clark never talked with any of these associates, other than Jacobs, about a joint venture. (Op. Br. p. 11, lines 20-32 incl.)

THE RECORD SHOWS the conversation with Jacobs occurred on or about March 23, 1960. [R. T. p. 76, line 15.]. Thereafter at a meeting of all of the associates at Las Vegas, Nevada, attended by Clark, it was stated, and agreed, that each associate would be an equal partner. [R. T. p. 83, line 11; p. 103, line 24, to p. 104, line 2; p. 43, line 5], and that during late

March or early April 1960, Clark, in conversation with *Wall* said that: "each of the associates would own an equal share of the business and have an equal voice in the operation of the business." [R. T. p. 138, lines 13-20, incl.] This describes a partnership or joint venture. (*Nelson v. Abraham*, 29 Cal. 2d 745; *People v. Syde*, 37 Cal. 2d 765; *People v. Davenport*, 13 Cal. 2d 681.)

(2) THE COURT ASSUMED that "*reference to a partnership was not made in talking to any of the other investors.*" (Op. Br. p. 13, lines 12-21 incl.)

THE RECORD SHOWS that a reference was made to this enterprise as a *partnership* or *joint venture* in Clark's conversations with *Jacobs*, Herbert L. [R. T. p. 92, line 25, to p. 93, line 15]; with *Montana*, Peter [R. T. p. 36, lines 3 and 4 and 7-11, incl.; p. 37, lines 14-17 incl.; p. 38, lines 8-11 incl.; p. 43, lines 5-15 incl.; p. 64, lines 23-26 incl.); with *Wall*, Eichard [R. T. p. 144, lines 22-24 incl.; p. 157, lines 21-26 incl.; p. 158, lines 20-24 incl.] and *Mirabella*, Joseph [R. T. p. 117, line 24, to p. 118, line 23.]

Sam Rothman did not testify but it is a necessary conclusion that the same description was understood by him because of his participation in said Las Vegas meeting.

(3) THE COURT ASSUMED that the other investors "did not talk partnership or joint venture, or sharing of profits or losses, with each other." (Op. Br. p. 12, lines 1-4 incl.)

THE RECORD SHOWS, as last hereinbefore reviewed, that wherein they discussed the nature of this enterprise between themselves they referred to it as a *partnership* or a *joint venture* and *never* as an ordinary

corporation, and to themselves, respectively, as *associates* and not as stockholders.

(4) THE COURT ASSUMED that "the investor had no agreement, express or implied, that they were to engage in an enterprise other than a corporate one." (Op. Br. p. 13, lines 2-7, incl.)

THE RECORD SHOWS that if by this statement it is intended to say that the associates never thought, or spoke, of this association otherwise than as an ordinary business corporation, and not as a joint venture clothed in corporate form, then this intendment is refuted by all of the evidences to which we have referred including the evidentiary admissions of said Honorable Appellate Court as stated in its Opinion (p. 13, line 26, to p. 14, line 6.) *There is no evidence to the contrary.*

(5) THE COURT ASSUMED that "certainly there was nothing more than a proposal to form a partnership in the future" (Op. Br. p. 11, lines 30-32 incl.)"

THE RECORD SHOWS that nothing was ever said by any of these associates about forming a partnership (a joint venture) in the future.

The only conversation ever had about forming a joint venture, was between Clark and Ruberti in mid-December 1959, and it was *formed then* by their mutual agreement.

Always thereafter the conversations clearly related to an acceptance of additional associates in an *existing* joint venture—the one formed, and incorporated for tax savings, in December 1959, by Ruberti and Clark.

(6) THE COURT ASSUMED that the "*meaning of associates*" at Las Vegas, on March 30, or April [illegible], 1960,

was *after* Montana and Jacobs had bought and paid for their stock in Glendale." (Op. Br. p. 6, lines 9-11 incl.).

THE RECORD SHOWS that this assumption is not supported by the record. Neither Ruberti nor Clark, nor both together, had any authority to make such a sale until it was approved by the associates at Las Vegas.

They were only two of four associates. The others then were Rothman and Mason.

The subject of the sales to Montana and Jacobs was not the property of Ruberti. He owned nothing that he could sell.

His receipt of checks from Montana and Jacobs was not as a seller. It was only as an individual or as an agent for them, who undertook a personal obligation to secure these interests for them; if acceptable to all of the associates, at a meeting of the associates to be held later at Las Vegas.

These *checks were not accepted* by the associates, or cashed, until *after* the vital elements of this entity had been discussed and changed drastically from those preliminarily discussed in California, and agreed upon, at the Las Vegas meeting, and Montana and Jacobs had then and there, and *not elsewhere*, been accepted as associates at Las Vegas—not at Glendale.

(7) THE COURT ASSUMED that "nothing could be more clearly a public offering" than the facts, (a) that each of these four investors was a stranger to appellant and his associates; (b) that his interest was aroused by a newspaper advertisement that brought him to Glendale office, and (c) that "there Clark and others induced him to buy stock." (Op. Br. p. 13, lines 10-15.)

THE RECORD SHOWS that there is not a single element of any public offering in this statement. The assumption is predicated upon a complete disregard of the essentials of a "*public offer.*" It is an unwarranted attempt to incorporate elements of criminality into a statute which clearly excludes them, by declaring criminal, an offer "*to set down and discuss a project*" which has never been held, in California, to violate the statute even before the amendment which added the stated exemption of section 25100(m) as to a joint venture. (See *B.C. Turf Country Club v. Daugherty*, 94 Cal. App. 2d 320.) (See Pet. Op. Br. pp. 29-33 incl.)

(8) THE COURT ASSUMED that "*the evidence credited by the trial judge refutes this argument.*" (Petitioner's Argument) "in practically every particular." (Op. Br. p. 3, line 6.)

THE RECORD SHOWS that there is absolutely no evidence, whether credited or discredited, which refutes your petitioner's arguments in any particular, much less, as erroneously assumed by the Honorable Appellate Court, "*in practically every particular.*"

The statement has been made, as a conclusion, by the Honorable Appellate Court, without any attempt to support it by reference to any evidence, law, or argument. *There is none.*

Appellant's testimony may be completely disregarded, and yet the testimony of all of the other witnesses, each of them called by the prosecution, and the evidences of the activities of every member of this group, and the physical evidences, and the presumption of appellant's innocence, confirm beyond any doubt, every fact affirmed by appellant in argument, and which, under the law, compel his acquittal.

Your petitioner respectfully contends, as he did to said appellate court in his petition for a rehearing, *supra*, and as he did to the Supreme Court of California in his petition for a hearing in said Honorable Court (Pet. for Hrg. pp. 24-35 incl. as to the facts) that each of these errors is a violation of your petitioner's right to due process, and to an equal treatment of the law, under the Fourteenth Amendment to the Constitution of the United States.

VI.

Whether a Citizen of the State of Nevada May Be Denied the Benefits of the Laws of the State of California, When in Like Circumstances They Are Accorded to a Citizen of California.

Your petitioner contends that the California Corporations Code, Section 26104(a) and 26100(m), as construed, and applied, by the Honorable Appellate Court in the case (No. 8298) at bar, is unconstitutional under the Fourteenth Amendment to the Constitution of the United States, wherein it denies comity to this joint venture as a citizen of the State of Nevada, and denies due process, and an equal protection, and enjoyment, of the laws of California, with the citizens of California in like circumstances.

It is settled law in California that a joint venture may be, and not uncommonly is, clothed in corporate form, and that such a clothing does not impair its status as a joint venture. (*Enos v. Picacho*, 56 Cal. App. 2d 765; *McSherry v. Market Corp.*, 120 Cal. App. 330, 333.)

It is also well settled law in California that "any certificate of interest" in a joint venture in California, is not a security. (*People v. Davenport*, 13 Cal. 2d 681,

687; *People v. Woolson*, 181 Cal. App. 2d 671; *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, 727.

It is also settled law in California that a joint venture is exempt from the operation of the Corporate Securities Act, under Section 25100(m) of said Act, unless it publicly offers for sale its associate memberships, or shares of its capital stock which evidence such a membership.

The joint venture in issue here exists as a citizen of another state, and operates, in like circumstances as a joint venture, which, under California law as above reviewed, is exempt from the California Corporate Securities Act, but; nevertheless, is denied by the decision in this case, the immunities enjoyed by a California joint venture similarly situated and operating as shown by the foregoing authorities.

This is a clear violation of the due process, and equal treatment of the law, guaranteed to this joint venture by the Constitution of the United States, and wherein it is invoked, as here, to affirm your petitioner's conviction, it is void. (*Gilbert v. Mathews*, 186 Kans. 672; 352 Pac. Rptr. 2d 58; *Clay v. Sun Ins. Co.*, 363 U. S. 207, 4 L. Ed. 2d 1170.)

VII.

Whether the Denial of an Augmentation of the Record Is a Denial of Due Process.

The Honorable trial judge in considering a revocation of probation, said that, "*I haven't paid any attention to the probation reports.*" [R. T. p. 257, lines 7-8.]

For this reason the record on appeal, approved by the *People*, your *petitioner's counsel*, and the *trial judge*, improperly omitted these; and denied due process.

Notwithstanding this, the Attorney General invoked a *presumption* that these reports contained matters that supported the revocation.

Your petitioner, in his Reply Brief, stated these circumstances of their omission, and requested an augmentation of the record to include them if the presumption were to be considered in their absence.

This request was not considered, or acted upon, by the appellate court until in its opinion *it invoked this presumption.* (Op. Br. p. 27, line 18.)

Petitioner renewed this request in his petition for a rehearing. The court denied petitioner's request and continued its invocation of this presumption, but sought to extenuate its rejection of petitioner's request by saying in its order denying a rehearing that your petitioner's request for augmentation *was belated*, and that "*on the contrary*," to the trial judge's statement that he had not considered the probation reports, the record shows that the trial judge said "let the record show the court has read and considered the report of the probation officer in Case No. 243,549 which recommends the denial of probation."

Petitioner's request "was not belated." It was made promptly, in petitioner's reply brief, upon the first appearance of any suggestion that this presumption should be invoked upon a record that had been approved by everyone in interest as containing the evidences upon which probation had been revoked.

The appellate court's reference to the trial judge's statement that he had considered the probation officer's report in Case No. 243,549, is an unfortunate misunderstanding, and confusion, of the record.

The statement was *not made* in, or with respect to, the case wherein probation was revoked (No. 8297). It was made in the case (No. 8298) wherein appellant had been convicted by the trial judge, and therefore, had been properly, and necessarily, excluded from the record in this case.

Your petitioner respectfully submits that this *presumption* may not be properly invoked in the circumstances here, and that the denial of petitioner's request for an augmentation of the record to include these records, is a denial of the *due process*, and *equal protection of the laws*, guaranteed to your petitioner under the Fourteenth Amendment to the Constitution of the United States.

Your petitioner urged this point in the appellate court, and it was rejected. (Pet. for Rehrg. p. 2, line 3.)

VIII.

Whether an Appellate Court May Affirm a Judgment of Conviction Upon a Presumption of Evidentiary Sufficiency Upon an Improper Denial of Augmentation.

As last hereinbefore reviewed, the Appellate Court denied an augmentation of the record.

It then invoked *a presumption* that the excluded records supported the order, and judgment appealed from.

Your petitioner contends that the invocation of this presumption as a substitute for the truth, easily, and immediately, available upon the requested, *but denied*, order of augmentation to include them, is a denial of due process, and equal treatment of the law, under the Fourteenth Amendment to the Constitution of the United States.

IX.

Whether Probation May Be Revoked in a Criminal Case Upon an Unsound Factual, and Legal Basis.

It is settled law that while a court has a wide discretion in imposing or modifying probation, it may revoke probation only upon a *sound, factual* basis.

A court may not act arbitrarily, or substitute "whim; caprice; rumor, or downright malice" for the legal discretion that is vested in it.

In *In re Dearo, supra*, 96 Cal. App. 2d 141, 143, the Court said that:

> *"The Court may act informally, but it may not act arbitrarily; to be valid the order of revocation must be based upon a factual showing sufficient to justify an exercise of discretion."*

This rule was stated, and applied, in *In re Cook*, 67 Cal. App. 2d 20, 26; *People v. Jones*, 87 Cal. App. 482, 496, and *Bailey v. Taafe*, 29 Cal. 422, 424.

In *In re Cook, supra*, 67 Cal. App. 2d 20, 26, the Court said, in an opinion by Presiding Judge Peek that:

> "In other words, under respondent's contention, it would be possible to substitute for such discretion, whim; caprice; rumor, or downright malice."

It cannot be said that such was the intention of the Legislature. Your petitioner re-emphasizes the facts: (a) that at the time said order of revocation was made, *the time* within which restitution was required to be made, *had not expired*; (b) the evidences before the court, not contradicted, and inherently reasonable, affirmed the good faith of petitioner in respect of said

matter; his intention, and desire, to make restitution, and (c) his inability then, and theretofore, to make said restitution.

Upon this record petitioner respectfully submits that any consideration of the fact of said *non-restitution* as a factual support of said order of revocation, must be rejected:

(a) as in excess of the *restricted discretion* of the court in that matter under the rule stated, and applied in *In re Cook*, 67 Cal. App. 2d 20, 26, and

(b) as in violation of the "due process" provisions of our State, and Federal Constitutions.

X.

Whether the Status of a Joint Venture Has Disappeared From This Case.

The learned District Court of Appeal stated (Op. Br. p. 13, line 5) "*So the claim of joint venture disappears from the case.*"

It postulates this conclusion upon its statements: (a) "*there never was any mention of holding the shares of stock jointly*," and (b) "*the investors had no agreement, express or implied, that they were to engage in an enterprise other than a corporation.*" (Op. Br. p. 13, lines 2-6 incl.)

Clearly, neither of these conditions is a necessary element of a joint venture. Such an association may operate in an incorporated, or in an unincorporated, form, and, if incorporated, there is no requirement that the stock be held in joint ownership.

To deny to your petitioner, upon these grounds, a defense that this association was a joint venture, as the appellate court has done, is a denial to your petitioner of due process, and equal protection of the laws, guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. This contention was submitted to the District Court of Appeal, and rejected without mention. (Pet. for Rehrg. p. 18, line 1 to end.)

Conclusion.

Your petitioner respectfully submits that the conduct of the Courts whereof your petitioner complains herein, is predicated upon a misconception of the evidences and of the law applicable thereto, and denies to your petitioner the presumption of innocence and the due process and equal treatment of the law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States, and that each of said judgments should be reversed.

Dated: September 26, 1963.

MORRIS LAVINE,
Attorney for Petitioner.

Verification.

State of California, County of Los Angeles—ss.

I, the undersigned, say:

I am the petitioner in the above-entitled action; I have read the foregoing Petition for Writ of Certiorari and know the contents thereof; and that the same is true of my own knowledge.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on September 20, 1963, at Los Angeles, California.

OLIVER OREN CLARK,
Petitioner-Declarant.

APPENDIX.

Findings of Trial Judge.

[Reporter's Transcript p. 238, line 20 to p. 240, line 18]:

The Court: Well, I don't think it is essential that the Court study the various authorities which have been cited, most of which I am acquainted with, and from time to time, on the question of joint venture.

I am not convinced that there was a joint venture with bona fides or otherwise. There was the element of control, of mutuality, of obligation, and the various elements which go into a joint venture, similar to a partnership appear to be missing to me outside of the certain terminology which has been used by Mr. Clark and others.

Certainly there was, as Mr. Cherniss suggested, there was no specified group who had peculiar qualities, abilities, as well as financial abilities to form this venture. It at most was open end.

There didn't seem to be anything they did that it would be limited to ten. They were discussing it with any number of people. But it just lacks to my mind the essential elements which you would find in a bona fide joint venture or partnership to engage in a particular purpose.

Irrespective of that, so far as Montana and Jacobs are concerned, I don't see how you can possibly avoid the determination that a violation of the Act took place when they executed those agreements, one on March 26, 1960, and the Jacobs agreement about the same time.

Irrespective of the newspaper ad, whether Mr. Clark had anything to do with it, in so far as Mr. Clark's

participation in the transactions with Montana and Jacobs, why, it's clear to me that he was an active aider and abettor in those transactions.

And so far as Mirabella and Wall, there isn't any question that they paid over money that they received, that Mirabella received stock and Wall was promised stock.

I don't see how you can possibly avoid a conclusion here that there was a violation of the Corporate Securities Act.

Counsel concedes this casting it in the form of a loan, of course, does not avoid the statute. I happen to pick up *People v. Smith*, 180 Cal. App. 2d 420.

I notice Judge Fox wrote the opinion. I happen to join in that. I didn't read it for that reason. But it was one of these typical transactions of a promissory note. That's about all it amounted to was a promise to issue stock.

The conviction was sustained on those facts alone.

With considerable regret, the Court is obliged to find the defendant guilty on all four counts as charged.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Oliver Oren Clark, Defendant and Appellant. Crim. Nos. 8297-8298.

Filed May 6, 1963.

Appeals from judgments and orders of the Superior Court of Los Angeles County. Phillip H. Richards,

Judge. Judgments affirmed; appeals from orders dismissed.

For Appellant: Oliver Oren Clark, in Propria Persona.

For Respondents: Stanley Mosk, Attorney General; William E. James, Assistant Attorney General; S. Clark Moore, Deputy Attorney General.

Two appeals are presented here upon a single reporter's transcript: one is taken from conviction of four counts of violation of §26104(a), Corporations Code,[1] and from order denying new trial (our No. 2nd Crim. 8298); the other from order revoking probation which had been granted in another case after plea of guilty of violation of said §26104(a), and from judgment rendered on February 1, 1962, in said cause (our No. 2nd Crim. 8297).

APPEAL NO. 8298

Oliver Oren Clark, veteran lawyer and practitioner of the Los Angeles Bar, while on probation following a previous plea of guilty of violation of §26104(a), Corporations Code, conceived in collaboration with his co-defendant, Emil J. Ruberti, a plan of action which the trial judge at the conclusion of a non-jury trial

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[1]Corporations Code §26104: "Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by a fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years or in a county jail not exceeding one year, or by both such fine and imprisonment:

"(a) Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue or contrary to the provisions of this division, or of the Constitution of this State . . ."

characterized in several instances as a "very thinly veiled attempt to avoid the Corporate Securities Act." After careful examination of the record, including the testimony, exhibits and briefs, we are brought to the same conclusion.

Appellant Clark in varying forms advances the following argument. He and a group of associates formed a joint venture for the purpose of establishing and operating a chain of discount stores in Southern California and the Las Vegas area of Nevada; to that end and as a means of tax saving under the portion of the income tax law relating to small business corporations (26 USCA §§ 1371, et seq.), appellant and others formed a Nevada corporation named Quality-Discounts, Inc., the articles of incorporation of which were filed on December 30, 1959. The plan was to limit the number of associates to ten in order to comply with the statutory definition of a small business corporation; each associate was to contribute his personal services to the business through employment as a store manager and as a director and officer of the corporation; though each of them was to subscribe $10,000 to the venture and receive stock therefor, the certificates were but evidences of participation in a joint venture, no public offering being made.

The evidence credited by the trial judge refutes this argument in practically every particular. In saying this we have in mind the rule stated in *People v. Alison*, 189 Cal. App. 2d 201, 205, and in many other cases. Alison says: "Before a judgment of conviction may be reversed on the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evi-

dence to support the conclusion reached in the court below. (*People v. Frankfort*, 114 Cal. App. 2d 680, 689 [251 P. 2d 401].) We must assume, in support of the judgment, the existence of every fact which the trial court could have reasonably deduced from the evidence and then determine whether the facts justify the inference of guilt.' (*People v. Deysher*, 2 Cal. 2d 141, 149 [40 P.2d 259].) Also, 'a finding that the transaction in question was within the proscription of the statute will not be disturbed if there was substantial evidence to support it.' (*People v. Rankin*, 169 Cal. App. 2d 150, 160 [337 P.2d 182].)"

Apparently the only persons who paid cash into the venture were the State's prosecution witnesses, Peter Montana, Herbert L. Jacobs, Joseph Mirabella and Richard K. Wall, together with Howard Esterson and an unnamed person who paid in $1,000. Though the procedure differed somewhat in each case, that of Montana is fairly typical.

He saw an advertisement in the Los Angeles Herald-Express which, by fair inference, read like the one seen by Mr. Mirabella in the Valley Advertiser, viz: "ASSOCIATE Active—Terrific opportunity. Participate in expanding 3 major discount store operations with high percentage of return plus salary. Investment up to $5000 secured. Mr. Harry. Ci-48401." A telephone call elicited the Glendale address of the headquarters of appellant and Ruberti, 310 North Glendale Avenue in Glendale, California; a visit there proved "Harry" to be one Sliger, who put Montana in touch with appellant Clark and Ruberti. They told him they had formed a Nevada corporation for a tax purpose, among others; that they needed $50,000 and

were looking for ten associates at $5,000 each; that he, Montana, would be paid back with stocks and would have a job managing one store on a weekly salary." Montana said he would buy $10,000 worth and they said "fine." "I told them that I was buying the $10,000 shares and they were going to give me 10,000 in preferred and 5,000 in common on that there, and Ruberti and Oliver Clark told me that I was supposed to get a job out of this and be a manager in one of the stores. I accepted the job and, of course, there was a few changes to be made in this document here, that we made, before I signed it." Montana delivered his check dated March 30, 1960, payable to Ruberti in the sum of $10,000; it has written on the back, above Ruberti's endorsement, the words "this check is for $10,000 Preferred Stock." Ruberti handed the check to Clark; it was endorsed and paid by the bank. Montana was handed a promissory note for $10,000 dated March 26, 1960, payable 30 days after date, "Principal and interest payable in Lawful Money of the United States at Glendale, Calif.—as per contract," the last three words being in Clark's handwriting; the note was signed "Emil J. Ruberti, Pres." A contract signed by Ruberti and "accepted" by Montana was delivered at the same time. It is set forth in the margin.[2] This agreement was drawn by appel-

[2] "March 26, 1960 Mr. Peter Montana, 10011 Marnice Avenue, Tujunga, California. Dear Mr. Montana:

"Today I have received from you the sum of $10,000 as a personal loan to me to be paid as hereinafter stated, and in evidence thereof I have executed, of even date herewith, my personal Promissory Note payable to you in said sum within thirty days after date hereof with interest thereon at the rate of 4% per annum, unless otherwise paid as herein provided, to-wit:

"I agree to procure within said period the issuance to you and to your wife, Anna Montana, as Joint Tenants, of 10,000

lant Clark who, as appears, was working in close co-operation with Ruberti. Clark handed it to Montana, having interlined in his own writing the words, "in a management capacity," and "Salary payable in weekly instalments," and "vice president"; he had also inserted 150 in place of 100 as the weekly salary. The cor-

shares of the authorized preferred capital stock, of the par value of $1.00 per share, fully paid, and 5,000 shares of the authorized common capital stock of no par value, fully paid, of Quality-Discounts, Inc., a corporation, as of this date. [Emphasis added.]

"Said corporation is organized as a holding company for a chain of discount stores, and will own a minimum of fifty percent of each store in said chain. The membership in this holding company is limited to ten associates of whom you will be one.

"Upon the issuance of said shares my Promissory Note to you in the sum of $10,000 executed as of even date herewith as above stated is to be cancelled by you, and returned to me.

"Concurrently therewith I will cause said Quality-Discounts, Inc. to execute a contract, in writing, wherein and whereby you are employed as of April 1, 1960, and thereafter as long as you may be able, and choose, to perform the duties of said employment, in some capacity agreeable to you in the merchandising operation controlled by said corporation, in a management capacity, preferably at Glendale or in North Hollywood, California, at a salary beginning April 1, 1960, of not less than $150.00 per week, and which salary is to be increased reasonably as the nature and quality of your services warrant. A suitable position, with opportunity of advantageous advancement, for your son will be available as and when desired by you and him, in said merchandising operation. Your employment at all times is to be in a position satisfactory to you. Salary payable in weekly instalments.

"In addition to the foregoing you are to be elected as a Director and vice president of said corporation, and you are to receive the benefits of insurance, and profit participation *in addition to your ownership of said common shares*, on the same basis as other employees of said corporation, which will be in accordance with the best standard of said practices now in vogue in merchandising business." [Emphasis added.]

ACCEPTED:
PETER MONTANA
Peter Montana
Florida 2-2488

Sincerely yours,
Emil Ruberti
EMIL J. RUBERTI, PRES.

poration had no permit to sell shares of stock nor did Clark or Ruberti have any permit.

A meeting of "Associates" was held in Las Vegas on March 30 or April 1, 1960. This was after Montana and Jacobs had bought and paid for their stock in Glendale. Directors of Quality-Discounts, Inc. were elected and a resolution was adopted authorizing issuance of corporate stock. On the train returning from Las Vegas to Los Angeles, certificates for 10,000 shares of preferred and 10,000 shares of common stock in Quality-Discounts, Inc., were issued to Montana and his wife and delivered to him; the blanks in it were filled-in the handwriting of Clark who signed the same as secretary, with Ruberti signing as president of the corporation. Clark claims delivery was made in Nevada but none of the other witnesses knows whether it occurred in Nevada or California.

Mr. Jacobs went to the Glendale office pursuant to a newspaper advertisement he had seen, saw Sliger, then Clark and Ruberti. Having told of his own background, Clark said he would be a good associate; that they were looking under the Small Businessmen's Act for ten associates to come into a venture of a discount chain. A few days later Jacobs and his wife told Clark and Ruberti they were willing to come in on the deal with $5,000. Ruberti said in Clark's presence that Jacobs was to be manager of a discount store in El Segundo "with a salary and full associate or partner—with the benefits coming from any money that was made over and above the salary." Clark wrote in longhand an agreement similar to the one given Montana. It contains this paragraph: "I have received five thousand from you as a personal loan to be repaid

within thirty days with interest at four per cent per annum, in accordance with the following: I agree to procure for you within said period 5000 preferred shares, and 2500 common shares, of the Quality-Discounts, Inc., fully paid. Said common shares are no par value, and said preferred shares are $1.00 par, and bears interest at 4% until retired." Ruberti signed it as "Pres." and Jacobs wrote the word "Accepted" and signed his name below it. There was also a Ruberti promissory note for $5,000 with principal and interest payable "as per contract of this date." Under date of April 1, 1960, certificates for 10,000 shares of preferred and 10,000 shares of common stock were issued in the names of Jacobs and wife as joint tenants. Each of them bears the endorsement: "For Value Received, I hereby sell, assign and transfer unto Quality-Discounts, Inc. ten thousand Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint Oliver O. Clark, secretary, to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises as security for the payment of my note of even date. Dated April 12, 1960. Herbert Jacobs. In presence of Oliver O. Clark." Apparently the blanks in the form were filled in Clark's handwriting. For some reason these certificates were cancelled.

On April 12, 1960, Mr. Jacobs gave a check for $5,000 payable to Quality-Discounts, Inc. bearing the notation "Bal. in full for stock." It was endorsed and deposited by the corporation. New certificates for 10,000 shares of each class of stock were issued to the Jacobs on April 12, 1960.

Mr. Mirabella saw the advertisement in the Valley Advertiser which is quoted above. He went to the Glendale office where he was told by "Harry", Jacobson, and another, "roughly the idea of the stores, the corporation they were going to form, in which I will get stocks and eventually employment to the store, in the store." He also talked with appellant on another visit and told him, "I don't know much about the stocks because I never bought any stocks in my life. So he explained me farther, he explained to me again, and he was very nice about it and telling me about the preferred stock and the common stocks." Clark also said he would get "shares, stock," "in the Quality-Discounts store" for the two cashier's checks he delivered. One was for $1,500 made to his order and endorsed to Ruberti who in turn endorsed it. The other was for $3,500 and was endorsed in the same manner. He was given a $5,000 note and later received certificates for 5,000 shares of preferred and 2,500 shares of common stock in Quality-Discounts, Inc., dated April 22, 1960. Mr. Mirabella, by trade a carpenter, was to take care of carpentry and display windows in stores, "in a few words, maintenance." He asked Clark, "if I can have some paper, I can read over and see what I get from this investment. And he all the time say, 'I haven't got it with me. The next time you come back I give it to you. That's the reason I went back so many times." He never received any such agreement or writing and never worked in any of the stores. Of course, he was not made a director or an officer. The following language of *People v. Smith*, 180 Cal. App. 2d 420, 424, 425, fits Mr. Mirabella: "With respect to Zoll (count I), Smith argues that he

was a joint adventurer and thus contributions made by him could not be sales of securities in any event. This argument is entirely specious. To constitute a joint venture there must be a community of interest in the enterprise, a sharing of profits and losses, and joint participation in conduct of the business." (*Lasry v. Lederman*, 147 Cal. App. 2d 480, 485-486 [305 P. 2d 663].) There is no showing in this record of any facts which would justify the conclusion that Zoll was a joint adventurer in Jet Air-Age. He was a part-time employee and an investor on a small scale. Although theoretically he would share in profits if any there were, there is no evidence that he exercised any degree of control of the business. His duties as an employee were limited to those of machinist and general helper.'"

Mr. Wall read an advertisement in the Los Angeles Times which took him to the Glendale office; "Mr. Clark outlined the organization of Quality-Discounts involving ten associates, each contributing $10,000.00 into the organization and receiving shares of stock for their monies. . . . Each of the associates would own an equal share of the business and have an equal voice in the operation of the business. Responsibilities of jobs and so forth was to be broken down in a manner to be outlined in the future. We touched on the corporation itself. It was told to me that the Quality-Discounts was a Nevada corporation and legally formed and had issued stock already. He was negotiating with several investors which at that time were to bring in substantial amounts of money." Clark also told him, "that previous associates had come into the association with the distribution of preferred and common stocks on an equal basis, one-for-one. He felt that

since I was one of the latest associates coming into the group, that the distribution of stock to me should be on the basis of two-for-one, that is two shares of common to one share of preferred, which boiled down to the fact that I would have half of the voting power that the other associates would have. I did not agree to come into the organization under these circumstances; and after a subsequent meeting, I came back to Mr. Clark and Mr. Ruberti and they agreed to issue the full amount of stock to me as other associates." Mr. Wall delivered to Ruberti, who in turn handed to Clark, his check of May 2, 1960, for $10,000 payable to Ruberti and it was deposited to the credit of Quality-Discounts, Inc., but he never received any stock certificate until he issued same to himself just prior to leaving the company in the second week of June, signing same as president of the corporation. The said check of May 2nd bore the notation on its face "Stock in Quality." Mr. Wall became manager of the Glendale store, as well as vice president and later president of the corporation.

He also testified: "Q. Mr. Wall, would you have gone to work for Quality-Discounts but for the opportunity to purchase stock in the organization? A. No. Q. You wouldn't have gone to work just for a salary without the stock ownership? A. No.". In this connection Mr. Montana said: "Q. By Mr. Walton: Was it your expectation when you invested money in this venture that profits would materialize without any exertions on your part? A. Yes. Q. This was your expectation? A Yes. I expected to make some money out of it. Q Without any exertions on your part? A Yes. . . . Q By Mr. Walton: Was it your expectation, Mr. Montana, that any profits that you

would realize or income would be in large measure attributable to your own exertions, your own activity as a member of this venture? A. No. I didn't know how much they was going to make out of it. Q. Whatever profits that might materialize? A. Whatever profits we were going to split between all the associates."

In all the talks had by Clark and Ruberti with those who invested in the project there was nothing said about a joint venture or sharing of profits and losses, nothing except the remark to Jacobs that he would be "a full associate or partner." Certainly that was nothing more than a proposal to form a partnership in the future, a nullity. (37 Cal. Jur. 2d §18, p. 556.) Reference to a partnership was not made in talking to any of the other investors, and they did not talk partnership or joint venture or sharing of profits or losses with each other. The only attempt to define the quoted remark for Jacobs benefit was the statement that the objective was to get together a group of associates whose investments would be equal and who would have equal control of the affairs of the business and that tax preferment would be gained through employing a small business corporation for which purpose Quality Discounts, Inc. had been formed.

The statute (26 USCA §1371) prescribes that a small business corporation shall have not more than ten shareholders and that if all of them consent (§1372), the corporation may elect that corporate income for income tax purposes shall be treated as set forth in footnote 3.[3] Clearly, the benefit of this statute could

[3] 26 USCA §1373: "*Corporation undistributed taxable income taxed to shareholders.*

"(a) *General rule.*—The undistributed taxable income of an electing small business corporation for any taxable year shall be

be had by a corporation only—not a joint venture. There never was any mention of holding the shares of stock jointly, and the investors had no agreement, express or implied, that they were to engage in an enterprise other than a corporate one. So the claim of joint venture disappears from the case.

There is a further valid reason for this conclusion. Interests in joint ventures are exempt from the Corporate Securities Act only if there is no public offering. (Corp. Code §25100(m).) In this instance each of the investors who testified was a stranger to defendant Clark and his associate; each came to the Glendale office because of interest aroused by a newspaper advertisement and there Clark and others induced him to buy stock. Nothing could be more clearly a public offering. (Cf. *Mary Pickford Co. v. Bayly Bros. Inc.*, 12 Cal. 2d 501, 514; *People v. Hoshor*, 92 Cal. App. 2d 250, 255.) It is argued that there is

included in the gross income of the shareholders of such corporation in the manner and to the extent set forth in this section.

"(b) *Amount included in gross income.*—Each person who is a shareholder of an electing small business corporation on the last day of a taxable year of such corporation shall include in his gross income, for his taxable year in which or with which the taxable year of the corporation ends, the amount he would have received as a dividend, if on such last day there had been distributed pro rata to its shareholders by such corporation an amount equal to the corporation's undistributed taxable income for the corporation's taxable year. For purposes of this chapter, the amount so included shall be treated as an amount distributed as a dividend on the last day of the taxable year of the corporation.

"(c) *Undistributed taxable income defined.*—For purposes of this section, the term 'undistributed taxable income' means taxable income (computed as provided in subsection (d)) minus the amount of money distributed as dividends during the taxable year, to the extent that any such amount is a distribution out of earnings and profits of the taxable year as specified in section 316(a)(2).

no evidence of appellant having knowledge of such advertisements but the testimony of Montana was that he heard it mentioned between Ruberti and Clark in the Glendale office; also, that he heard Ruberti say in Clark's presence: "[T]hey were putting an ad in the paper to see if we can get some more associates, so we can raise our $100,000." At another time he testified: "They were advertising it in the paper." Moreover, the advertisements were authorized at the meeting held in Las Vegas.

The plan of Clark and Ruberti not only required a corporation as the money making entity (because of income tax law); but it also sought exemption from the Corporate Securities Act through application of the doctrine of *People v. Syde*, 37 Cal. 2d 765, and similar holdings. The court there said, at page 768: "It is settled that the Corporate Securities Law was not intended to afford supervision and regulation of instruments which constitute agreements with persons who expect to reap a profit from their own services or other active participation in a business venture. Such contracts are clearly distinguished from instruments issued to persons who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise to be conducted by others; and the court will look through form to substance to discover whether in fact the transaction contemplates the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers are to share." Hence, the Clark emphasis upon a group of associates having equal investments in the business and equal control over its management through personal participation in its affairs. Frequent efforts to apply the Syde doctrine to issuance of cor-

porate stock have proved unsuccessful, as must this one. The case falls within our decision in *People v. Mills*, 162 Cal. App. 2d 840.

In that case Mills, a disbarred lawyer, had some Nevada mining properties which he desired to promote. He formed a Nevada corporation, negotiated in California for sale of its stock, not having obtained a permit from the Commissioner of Corporations, held a meeting in Nevada at which officers were elected and authorization given for transfer of the properties to the corporation and issuance of stock in exchange therefor. Meng and Shrader (investigators for the Los Angeles District Attorney) purported to be purchasers. Mills was convicted of violation of the Corporate Securities Act and on appeal sought refuge behind the Syde doctrine. At page 844 of 162 Cal. App. 2d this court said: "Appellant's major contention is that there was no 'security' involved in his transaction with Meng and Shrader because they were to become members of a four-member board of directors of the corporation, Clark Uranium & Copper Company, and were to be vice-president and treasurer of the corporation, respectively; and one of them was to cosign all checks with defendant Mills acting as president. Invoking *People v. Staver*, 115 Cal. App. 2d 711 [252 P. 2d 700]; and *People v. Jaques*, 137 Cal. App. 2d 823 [291 P. 2d 124], appellant argues that any profit upon their investment could be reaped only through personal efforts of Meng and Shrader and hence the rule of cases such as *People v. Syde*, 37 Cal. 2d 765, 768 [235 P. 2d 601], *People v. Gould*, 37 Cal. 2d 885 [235 P. 2d 604], and *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, 727 [134 P. 2d 777], becomes applicable and controlling."

At page 849: "Under the California statute an offer or attempt to sell comes within the definition of sale (Corp. Code, §25009), and a sale made without an appropriate permit constitutes a crime' (§26104). (*People v. Mills, supra,* 148 Cal. App. 2d 392, 407; *Ogier v. Pacific Oil & Gas Development Corp.*, 135 Cal. App. 2d 776, 779-780 [288 P. 2d 101].) It is said in the cited case of *People v. Jaques, supra*, 137 Cal. App. 2d 823, 832: 'Even an agreement to reach an agreement to sell stock would be, at least, an "offer to sell" which is prohibited by section 25009.'

"'The evidence at bar discloses a palpable attempt at evasion of the California Corporate Securities Act. The offer to sell the stock was made and accepted in this state; the price was to be paid and the stock delivered here. The proposed meeting in Nevada was for the sole purpose of transferring the so-called lease to the corporation and having the stock issued there, delivered to Mills (the real seller) [footnote omitted] and by him brought to Los Angeles for delivery to the buyers. The mere fact of issuance of the stock in Nevada does not save the transaction from the stigma of calculated evasion or from the sanctions prescribed by the statute for violation of its terms. That such is the law is attested by [numerous citations]. In the first cited Sears case it is said: 'The Corporate Securities Act clearly prohibits a foreign corporation from soliciting in California a sale of stock of its own issue without first securing a permit, even though in good faith the issuance of the stock and transfer of title are to take place in a foreign state.' (*People v. Sears, supra*, 138 Cal. App. 2d 773, 791.)'

"The contention that the status of Meng and Shrader as corporate directors and officers precludes the appli-

cation of the general rule cannot prevail. The point made by appellant is that the venture could not function without the active participation of Meng and Shrader because they were to be two of four directors, and all company checks were to be signed by one of them; hence without their consent no money could be spent and no board action taken. The rule that where 'the assignee [buyer] is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest . . . is not a security within the act' (quoting *Austin v. Hallmark Oil Co.*, *supra*, 21 Cal. 2d 718, at 727), did not arise from any such corporate internal situation, nor was it intended to apply thereto. The doctrine grew out of the necessity of determining what is an investment contract or a certificate of interest or a participation in an unincorporated venture, such as a real estate subdivision, an oil well, a mine, or the like. [Citations.] To apply it to a sale of corporate stock would open a broad avenue for safe evasion of the statute in cases of small operations. It would be necessary only to make the buyers corporate officers and directors with a controlling vote and sales of the company stock could be made without a permit and with impunity. Many a rascal would relinquish control of a speculation for cash in hand. Such an interpretation of the law would permit most closed corporations to issue stock without consulting the Commissioner of Corporations and later to resell the same to members of the public.

"The initial 'Blue Sky' legislation in this State was the Investment Companies Act (Stats. 1913, ch. 353, p. 715) which confined its definition of security to 'stock, stock certificates, bonds, and other evidences

of indebtedness, other than promissory notes not offered to the public by the maker thereof' (§2(b)). Note 13 on page 544 of 6A Cal. Jur. (§306), says: 'The defect in the original act of 1913 was that it applied only to the issuance and sale of stock by the corporation itself, not to anything but "stock" and not to resales of stock issued in other states by corporations thereof, and not to bonds, participation shares other than stocks, or to shares in unincorporated companies and trusts.' The law proved defective because of the many investment arrangements devised to defeat its ends. Accordingly, it was strengthened by including participations of various sorts in the definition of security. Speaking of the Corporate Securities Act, as passed in 1917 and amended in 1919, the Supreme Court said, in *In re Girard*, 186 Cal. 718, 723 [200 P. 593]: 'The provisions regarding companies, trusts, and trustees were inserted in the act for the evident purpose of preventing evasions such as would follow if the operation of the act was confined to corporations alone.' The task then devolved upon the courts to determine what is a 'security' (not what is a share of stock, the primary type of security), and in so doing to protect ordinary business transactions that are not within the evil at which the act is aimed (see *People v. Syde*, *supra*, 37 Cal.2d 765, 768; *People v. Rankin*, *supra*, 160 Cal. App.2d 93, 96), and to prevent evasion of the statute on the other hand. It was this problem that gave rise to the line of cases typified by *People v. Steele*, *supra*, 2 Cal. App. 2d 370, 374, and other cases above cited, cases prescribing the test of whether the investor expects his profits to flow from his own efforts or from those of others. None of said cases holds or intimates that a corporate structure can be set

up which will exempt sale of the stock from control of the statute. We hold that appellant's attempt thus to evade the law cannot succeed; that sale of stock without a permit violates the statute regardless of the control of the shares of the issuing corporation. A sale of 75 per cent of the stock in one block is as much a violation of the act as a sale of 5 per cent. The actual rulings in *People v. Staver, supra*, 115 Cal. App.2d 711 and *People v. Jaques, supra*, 137 Cal. App.2d 823, relied upon by appellant, are not opposed to the views just expressed." At page 852: "The Jaques case, *supra*, dealt with an arrangement whereby one Weaver advanced $7,500 to be used for purchase of stock in a corporation which was to be formed for prosecution of a certain venture, but upon condition that he have employment agreeable to himself. The court said that the facts showed a sale of a security unless the fact that Weaver's purchase was contingent upon his being employed by the proposed corporation changes the legal effect.' (P. 832.) It was held that *People v. Syde, supra*, 37 Cal.2d 765, and *People v. Davenport, supra*, 13 Cal.2d 681, were not controlling. After discussing those cases the court said, at page 834: 'A general rule may be deduced from the cases to the effect that if the enterprise is in the nature of a joint venture or if the investor is to have an active participation in its formation, or its operation is dependent for its success partly on the efforts of the particular investor, then, in any such event, the Corporate Securities Law does not apply.' This statement is too broad, as appears from the court's reliance upon certain Minnesota cases reviewed at page 835, and from this concluding paragraph of the discussion: 'In our case, the agreement was that Weaver was to receive stock and to work for

the corporation as vice president or secretary. The Gopher Tire case (*supra* [140 Minn. 52 (177 N.W. 937)]), indicates that where the corporation can operate just as well without the services of the one agreeing to buy stock, the agreement comes within the terms of the Blue Sky Law. (See 25 So.Cal.L.Rev., p. 210.) Applying that test here, it appears that the proposed corporation when formed could operate without Weaver. While there was some discussion of his helping in the advertising of the proposed corporation and in the selling of stock, his services were not indispensable. His participation either before or after incorporation was not to be the active participation which would make the enterprise a joint adventure, or would make the agreement any the less an "investment contract" or an agreement to buy corporate stock.' This case was not passed upon by the Supreme Court and we consider that intimations in the opinion that agreed personal services of the buyer can immunize a sale of stock without a permit do not bind us. Certainly the ruling in the case, as distinguished from its general language, is not opposed to the holding at bar. We do not mean to say that a bona fide joint venture would violate the statute merely because of an expressed intention to incorporate in the future and then issue stock. (See *Polizzi v. Porcaro*, 110 Cal. App.2d 395, 399 [242 P.2d 949]; *Nicholl v. Ipsen*, 130 Cal. App.2d 452, 457-460 [278 P.2d 927].) That is not the situation before us."

Anent this last observation, *Enos v. Picacho Gold Min. Co.*, 56 Cal. App.2d 765, 772, is pertinent: "As suggested in *McSherry v. Market Corp.*, (1933) 129 Cal. App. 330, 333 [18 P.2d 776], cited by plaintiff,

a corporation may be but an instrumentality to carry out a joint adventure, and hence the mere fact that a corporation is interposed as an operating agent between two parties who hold its shares does not prevent them from being joint adventurers. But, on the other hand, that mere fact does not make them joint adventurers. The elements of a joint adventure must be found in other matters."

People v. Alison, supra, 189 Cal. App.2d 201, 205: "The fact that the options were given in California, with the transfer of title to the stock taking place in Nevada pursuant to arrangements made by defendant for a meeting in Nevada, for the transfer of the money, is immaterial. The offer or attempt to sell took place in this state. The offense for which defendant was convicted therefore took place here."

People v. Jaques, 137 Cal. App.2d 823, 831, is in point. The court there said: "The statement in defendant's letter to Weaver of July 22, 1952, stating 'At the time the corporation is formed we will issue you stock at the rate of one hundred dollars ($100.00) per share,' coupled with Weaver's letter to defendant of August 9th stating that he was sending the $7,500 'for eventual investment in the Honeycraft Corporation as set out in your letter to me of July 22nd' and defendant's acceptance of the check and cashing it, are alone sufficient to show a 'sale' of a 'security' under the Corporate Securities Act, and a violation thereof, unless the fact that Weaver's purchase was contingent upon his being employed by the proposed corporation changes the legal effect." At page 833: "It cannot be questioned that Weaver's subscription was subject to a contract of employment agreeable to himself being

obtained. Defendant contends that this fact brings the case within the rule of *People v. Davenport*, 13 Cal.2d 681 [91 P.2d 892], *People v. Syde*, *supra*, 37 Cal.2d 765, and others, that 'It is settled that the Corporate Securities Law was not intended to afford supervision and regulation of instruments which constitute agreements with persons who expect to reap a profit from their own services or other active participation in a business venture.' (*People v. Syde*, *supra*, 37 Cal.2d at p. 768.) 'The facts of that case are easily distinguishable from the facts in our case. . . . The court held that the Corporate Securities Law did not apply to contracts of this kind, as they were agreements for the rendition of compensated services by both parties to the contracts and that there were no securities or other instruments mentioned in the Corporate Securities Law involved." At page 830: "In our case, the agreement was that Weaver was to receive stock and to work for the corporation as vice president or secretary. The Gopher Tire case (*supra*, 177 N.W. 937) indicates that where the corporation can operate just as well without the services of the one agreeing to buy stock, the agreement comes within the terms of the Blue Sky Law. (See 25 S.Cal.L. Rev., p. 210.) Applying that test here, it appears that the proposed corporation when formed could operate without Weaver. While there was some discussion of his helping in the advertising of the proposed corporation and in the selling of stock, his services were not indispensable. His participation either before or after incorporation was not to be the active participation which would make the enterprise a joint adventure, or would make the agreement any the less an 'investment contract' or an agreement to buy corporate stock."

The business had a short life, not more than two months. None of the investors received any of his money back and those that were managers of stores collected only small amounts as salary. Of course, financial loss to the investor is not a necessary element of the crime (*People v. Woolson*, 181 Cal. App. 2d 657, 672, 673), but the evidence is clear that, without consideration of this factual element the statute was violated. The idea of a joint venture seems to have been an afterthought, but the effort to inject the Syde doctrine into a plain sale of shares of stock not covered by a permit can only be viewed as a "thinly veiled attempt to avoid the Corporate Securities Act," especially as it occurred almost two years after the decision in *People v. Mills, supra*, and while appellant was on probation following a plea of guilty of violation of the same §26104(a) of the Corporations Code.

APPEAL NO. 8297

Defendant appeals from judgment of February 1, 1962, and order revoking probation on that date. Conceding in his brief that the order is not appealable (under *In re Bine*, 47 Cal.2d 814, 818), appellant properly asserts it to be in the category of an intermediate order reviewable on appeal from the judgment (see also, *People v. Robinson*, 43 Cal.2d 143, 145.)

In this case defendant Clark was charged in eight counts with grand theft and in five with violation of §26104(a) Corporations Code. On January 21, 1957, he pleaded guilty to counts 2 and 6 (violation of §26104(a)), proceedings were suspended as to those counts, and he was granted probation on February 19, 1957, for a period of five years with the proviso that

"Defendant must make restitution as determined by the Probation Officer to those persons who desire that their money be paid back and must not engage in any form of illegal activities." Other counts were dismissed.

A hearing upon violation of probation was transferred to the court of Judge Philip H. Richards (who had tried the case above discussed under our No. Crim. 8298). It was heard on February 1, 1962, probation was revoked and defendant sentenced to imprisonment in the County Jail for one year and payment of a fine of $3,000; "Sentences as to Counts 2 and 5 are ordered to run CONCURRENTLY with each other and CONSECUTIVELY to the sentences in Case No. 243549, Counts 1, 2, 3 and 4."

It seems that persons having claims aggregating $5,500 indicated their desire to have the money repaid to them but it appeared at the hearing that no restitution had been made by appellant though the five-year period would expire in less than three weeks from the date of that hearing. Protestations of past inability, but probable ability to perform within the remaining time with the help of friends, were not accepted as reliable. In No. 8298 appellant testified that he had given numerous guarantees for Quality-Discounts, Inc. in March-June, 1960, had advanced $7,000 for remodeling the Glendale store, $2,500 as a rent deposit with Security-First National Bank, $500 deposit with the utilities department of the City of Glendale and that he and his wife had guaranteed supplies purchased by the corporation to the extent of either $10,000 or $15,000. He also testified: "Q. Mr. Clark, you gave these various guarantees to merchandise suppliers, the sign company and the Security First National Bank, the les-

sor of the Glendale store. Do you have a net worth sufficient to make good—to make these guarantees good, do they mean anything? A. I do—". (Though objection was sustained the answer was not stricken.) During the whole progress of the Quality-Discounts, Inc. venture nothing was paid in furtherance of appellant's probation requirement.

The fact that Judge Richards had found him guilty of four violations of the Act in March, April and May, 1960, was enough, standing alone, to justify revocation of his probation in the previous case.

People v. Robinson, supra, 43 Cal.2d 143, 146: "The record reveals that at the time of revocation of defendant's probation, a hearing was had wherein it appeared that defendant had been found guilty of a conspiracy to violate section 337a of the Penal Code (committed October 24, 1952). The appeal from such judgment of conviction has this day been decided and the judgment has been affirmed. (*People v. Robinson*, Crim. No. 5580, *ante*, p. 132 [274 P.2d 865].) Manifestly, such conviction, though not then final pending appeal, was sufficient to warrant the trial court's conclusion that defendant was engaged in criminal practices in violation of the terms of his probation, which was thereupon revoked. Under all the circumstances there is no basis for disturbing the judgment entered against defendant." To the same effect see, *People v. Ketchum*, 185 Cal. App.2d 620, 621.

"The court may revoke probation solely on the basis of the probation officer's report." (*In re Levi*, 39 Cal.2d 41, 44.) It is apparent from the record at bar that the probation officer had reported adversely upon

petitioner's desired continuance of probation. The report is not before us and therefore a presumption arises in favor of the court's ruling. The judge's remark which appellant seeks to capitalize, "I have not paid any attention to the probation reports"—was made prior to his granting a three weeks continuance of the probation hearing and has no pertinence to the question now before us. There is nothing to indicate that Judge Richards was not fully advised when he made his ruling and sentenced defendant.

Appellant was not harshly or unfairly dealt with and we find no basis for reversal in either case.

Judgment in No. 8298 is affirmed; appeal from order denying new trial is dismissed.

Judgment in No. 8297 is affirmed; appeal from order revoking probation is dismissed.

Ashburn, *J.*

We concur:

Fox, *P. J.*

Herndon, *J.*

Order Modifying Opinion and Denying Rehearing.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Oliver Oren Clark, Defendant and Appellant. Crim. Nos. 8297-8298.

Filed Jun 3, 1963.

The Court:

The sentence reading "There is nothing to indicate that Judge Richards was not fully advised when he made his ruling and sentenced defendant" (which appears on the last page of the opinion, 215 A.C.A. at 851) is modified by adding thereto the following: "; on the contrary, the judge made this statement immediately before revoking probation: 'Let the record show the Court has read and considered the report of the probation officer in Case Number 243549 which recommends the denial of probation.'" Appellant's belated request for augmentation of the record which appears at page 41 of his Reply Brief is denied. Petition for rehearing denied.